IN THE UNITED STATES BANKRUPTCY COURT
FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	)	
	)	Chapter 11 Case
LEROY MOORE)	)	Number 488-00105
	)	
Debtor	)	
	)	
CONNECTICUT NATIONAL BANK	)	
	)	
Movant	)	FILED
	)	at 10 O'clock & 48 min A.M.
vs.	)	Date 10-14-88
	)	
LEROY MOORE)		
	)	
Respondent	)	

ORDER

Connecticut National Bank has moved for relief from stay and has objected to use of cash collateral with regards to twenty two (22) single family, semi-detached dwellings known collectively as Hunters Pointe which is property of the debtor. The bank has a claim secured by eleven (11) first priority deeds to secure debt covering the units. By stipulation of the parties, the bank's claim totals One Million One Hundred Twenty Seven Thousand Four Hundred Sixty Three and 84/100 ($1,127,463.84) Dollars as of May 1, 1988. The property is further encumbered by a second lien which secures an indebtedness as of May 1, 1988 of One Hundred Thirty Seven Thousand Sixteen and 56/100 ($137,016.56) Dollars. The total debt secured by the

Hunters Pointe property equals One Million Two Hundred Sixty Four Thousand Four Hundred Eighty and 30/100 ($1,064,480.30) Dollars.

The bank, supported by testimony of its expert appraisal witness, takes the position that the value of the property as of May 1, 1988 was Eight Hundred Twenty

Thousand and No/100 ($820,000.00) Dollars. The debtor concedes that there is little or no equity in the property but according to its expert testimony asserts a value of One Million Two Hundred Eighty Seven Thousand and No/100 ($1,287,000.00) Dollars for the property. Although there is substantial discrepancy between the values at this point in this proceeding a resolution of this discrepancy is not required.

Bankruptcy Code §362(d)(2) requires a finding of not only a lack of equity in the property but also that such property is not necessary for an effective reorganization. 11 U.S.C. §362(d)(2)(A)(B). In the present matter, the income the debtor receives for rental of the Hunters Pointe units constitutes approximately one third of the debtor's total monthly cash income of Thirty Four Thousand and No/100 ($34,000.00) Dollars. Since the inception of this Chapter 11 proceeding, this debtor has maintained that in order for unsecured creditors to realize any dividend, an orderly liquidation over time of substantial portions of the debtor's real property is required. This position is supported by the unsecured creditor's committee. To manage and market the nearly one hundred parcels of real

property of the debtor's estate, the debtor requires approximately Thirty Three Thousand and No/100 ($33,000.00) Dollars per month. Clearly, the income from the property in question, Hunters Pointe, is essential to any successful reorganization.

At this stage of this Chapter 11 proceeding, the debtor must establish that the property in question is essential for an effective reorganization that is in prospect meaning that there must be a reasonable possibility of a successful reorganization within a reasonable period of time. United States Savings Association of Texas vs. Timbers of Inwood Forest Associates, Ltd. U.S., 108 S. Ct. 626 (1988).

The debtor has met this burden. The essence of the debtor's effort at reorganization is an orderly liquidation of a substantial portion of the real estate holdings of the estate. The debtor may realistically be able to gain significant increases in the amounts received for his properties by means of an

orderly liquidation. The debtor is currently marketing the properties in accordance with such a view and from initial indications has taken a realistic view toward valuation. Property in which no equity exists have been abandoned to creditors holding secured claims against the property. A reorganization of this debtor with substantial liquidation of debtor's assets is a realistic possibility which requires the debtor to continue the management and marketing of the properties with these activities' attendant costs.

In addition to 11 U.S.C. §362(d)(2) relief from stay has been pled by the bank pursuant to the "for cause" grounds under §362(d)(1). The bank alleges a lack of adequate protection asserting that the property in question may be declining in value. The bank correctly asserts that even under the Timbers criteria, adequate protection would be required for an under secured creditor if the security was declining in value. The facts of this case do not support this contention. The property in question is substantially rented, historically the turnover rate and vacancy rate of the property has been low and the property is insured and is being well maintained by the debtor.

The final argument set forth by the bank pertains to its objection to the use of cash collateral by the debtor under 11 U.S.C. §363. The bank asserts that it holds a security interest in the rents received from the Hunters Pointe properties and that the debtor is using the rents without its permission and without affording adequate protection to the bank. The deeds to secure debt held by the bank provide:

> 20. Assignment of Rents; Appointment of Receiver; Lender in Possession. As additional security hereunder, Borrower hereby assigns to Lender the rents of the property, provided;

> that Borrower shall, prior to acceleration under paragraph 18 hereof or abandonment of the property, have the right to collect and retain such rents as they become due and payable.
>
> Upon acceleration under paragraph 18 hereof or abandonment of the Property, Lender, in person, by agent or by judicially appointed received shall be entitled to enter upon, take possession of and manage the property and to collect the rents of the Property, including , those past due. . . .

Under paragraph 18 of the deeds to secure debt, "acceleration" requires

> . . . . Lender prior to acceleration shall mail notice to Borrower as provided in paragraph 14 hereof specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed and sale the Property. . . . If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Deed to be immediately due and payable without further demand.

The bank admits that no notice as required prior to acceleration took place before the filing of the debtor's petition for relief. The bank asserts that its failure to provide notice of acceleration is due solely to the imposition of the §362 stay.

The extent of a secured creditor's interest in rents pursuant to an assignment of rents must be determined by reference to applicable state law. Butner vs. U.S. 440 U.S. 48 (1979). Georgia law is the applicable state law in this case. Under Georgia law an assignment of rents can in fact give a creditor a secured interest in rents. See, In Re: Jones, 77 B.R. 981 (Bankr. M.D. Ga., 1987). The debtor argues that while

an assignment of rents can in fact give a creditor a secured interest in rents such

interest amounts to only a passive assignment conveying no present interest to the secured creditor. 2 Pindar, Georgia Real Estate, ¶21-14.2 (3d Ed. 1986). The debtor's position in reliance upon the Pindar treatise that any assignment of rents taken in a security deed as additional security is a passive assignment which conveys no present interest in the rents to the secured creditor is in error. An unconditional assignment can create a present interest in rents for the benefit of a secured creditor. See, Jones supra.

The Jones court found that the creditor in fact had a present interest in the rents without the need of any triggering event to create such a right for the benefit of the creditor.

The pertinent language in that assignment of rents provided:

> .... Borrower does hereby grant, bargain, sell, convey, and assign unto the Government. . . . the rents . . . owing to Borrower by virtue of any ... lease. ... In Re: Jones, 77 B.R. at 982.

The Jones court in reaching its decision contrary to the position taken in the Pindar treatise analyzed several Georgia appellate decisions. Stevens vs. Worrill 137 Ga. 255 (1911) established that the grantor of a security deed is entitled to continue to collect rents where the grantor remains in possession of the property. In Worrill there is no indication that there was an assignment of rents clause of any kind in the security deed under consideration. The "possession" factor enunciated in Worrill

was reinforced in Penn Mutual Life Ins. Co. vs. Larsen, 178 Ga. 255 (1933). In Larsen, the security deed in question had a clause providing that upon default the creditor could enter the premise and collect rents. The Larsen court found that the grantor of the security deed remain entitled to rents despite default as the creditor had not perfected its right to the rents since it had not taken possession of the property as required by the security deed. In Padgett vs. Butler, 84 Ga. App. 297 (1951) the borrower assigned to the lender all rent from the property with no condition placed on the assignment. In Padgett the court held that default alone was

sufficient to give the creditor a present right to the rents.

A review of Jones and the above referenced Georgia decisions establishes that the language of the deed to secure deed clause assigning rents determines whether the assignment grants to creditor a present right to the rents or a right conditioned upon perfection through some action such as default, default and notice of acceleration or taking possession of the property by the secured party. In the present case, the language of the assignment of rents requires that notice of default and a right to cure be afforded prior to acceleration and prior to this creditor's right to collect the rents. The bank's right to the rents and the limitation on the debtor's use of the rents is contingent upon a condition precedent which has not yet been met. Before the bank would be entitled to the rents or

any limitation upon the debtor's use of the rents acceleration must occur in accordance with the debt instruments.

The bank recognizes the plain language of the security deeds but argues that acceleration has in fact occurred as a matter of law upon the filing of the bankruptcy petition. First, the bank asserts that pursuant to 11 U.S.C. §502 the filing of the petition accelerates the principal amount of all claims against the debtor. Section 502 does in fact allow a claim even if the claim is contingent or unmatured. This, however, merely permits a creditor to file a claim for the full amount of the principal indebtedness and have that claim allowed. Section 502 does not purport to substitute the force and effect of §362 with an alternative means for perfecting a security interest after the date of filing. In this case, perfection of the bank's security interest in future rents required acceleration. No acceleration had occurred prior to the filing of this petition and §362 stays such action. Since, the creditor's present right to the rents is unperfected under state law and the debtor's right to use of the funds as per the deed to secure debt is unlimited, the creditor is not entitled to an order preventing the debtor's use of the rents or alternatively an order conditioning the use on providing

adequate protection.

IT IS THEREFORE ORDERED that the bank's motion for relief from stay is denied and its objection to use of cash collateral is overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 14th day of October, 1988